No. 13253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST GRANVILLE BOOTH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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Jurisdictional Statement.

The appellant's Petition for Writ of Habeas Corpus in the Court below was presumably authorized by Sections 2241, *et seq.* of Title 28, United States Code. The appellee contends that Section 2255 of Title 28, United States Code, foreclosed the appellant from asking a Writ of Habeas Corpus in the absence of a showing that his remedies under Section 2255 were inadequate or ineffective to test the legality of his detention. Appeal to this Court is authorized by Section 2253 of said Title 28.

Statement of the Case.

A Statement of Facts has been furnished in this brief to afford the Court an outline of the numerous proceedings that have taken place, most of which form the basis for one objection or another of the appellant.

Briefly, the appellant, by Motions to Vacate Judgments, claimed that he was coerced into pleas of guilty and improperly arraigned. When his motions were denied, he did not appeal. Later he asked that a Writ of Habeas Corpus issue. The petition for the Writ was denied, but opened new fields for complaint by the appellant. The Court held that appellant was in state custody under state judgments of conviction and that, as no attack was made on the state judgments, the Writ would not issue. As there was no state officer that the Order to Show Cause could be directed to, the Court directed the Order to Show Cause to the United States Marshal merely to bring the matter properly before the Court. Appellant complains of this. He alleges that he was not given a hearing but it is believed that this Court will find that his claims are based on misstatements and misquotations and that he did in fact have a full and fair hearing in each stage of his proceedings.

The appellee contends that all of the complaints levied against the Habeas Corpus proceedings are irrelevant because the Writ should not have been granted in any case due to the limitations laid down by Section 2255, Title 28, United States Code, and the interpretation thereof by the United States Supreme Court, in the case of *United States of America v. Hayman,* 342 U. S. 205, and by this Court in *Fred Dwight Jones v. Squier* (Warden), Case No. 13200, and *Willard A. Winhoven v. Swope* (Warden), Case No. 12933, both decided February 28, 1952.

Statement of Facts.

In the year 1943, the appellant was convicted of theft from interstate shipment on Count 4 of an indictment in an action entitled "United States v. Ernest Booth, *et al.*," Case No. 16167, before United States District Judge Ben Harrison. The case was reversed by the Ninth Court of Appeals for an error in one of the instructions to the jury.

In the year 1947 the appellant was apprehended and indicted in an action entitled "United States v. Ernest Granville Booth," Case No. 19263, charging bank robbery. At the time of his arrest, he had not been retried in action No. 16167, the theft case referred to above.

On April 21, 1947, the appellant appeared before United States District Judge Jacob Weinberger for arraignment and plea [Tr. p. 103]. At that time, he was represented by his counsel, Mr. Morris Lavine, who requested that the proceedings in the District Court be delayed to permit the appellant to plead to similar robbery charges in the State Court before entering a plea in Federal Court [R. T. April 21, 1947, p. 1]. This request was granted and the matter continued until May 5, 1947 [R. T. April 21, 1947, p. 2]. Subsequent continuances were granted.

On May 19, 1947, appellant was sentenced in the State Court proceedings. On May 28, 1947 an order was issued by United States District Judge Paul J. McCormick directing the United States Marshal to release the appellant to the Sheriff of Los Angeles County so that he might enter upon the service of the state sentence [Tr. p. 80].

Appellant finally appeared before Judge Weinberger on June 6, 1947, at which time he was again represented by his counsel, Mr. Lavine [R. T. June 6, 1947, p. 3].

Mr. Lavine asked leave to withdraw the plea previously entered as to Count One of the Indictment in Case No. 19263 for the purpose of entering a new and different plea [*id.* p. 3]. The Court asked if there had been an arraignment. The Assistant United States Attorney said that there had been an arraignment [*id.* p. 4]. Mr. Lavine did not contest this. Mr. Lavine then said the appellant would waive the indictment [*id.* p. 4]. The Court asked the appellant personally if he wanted the indictment read. He replied "no," [*id.* p. 4]. The Court apparently was still not satisfied, so he ordered the indictment read to the appellant [*id.* p. 4]. Thereafter the appellant entered a plea of guilty [*id.* p. 5]. Appellant pleaded not guilty to Count Two of the indictment. This count was dismissed after sentence. The appellant then asked leave of the Court, through Mr. Lavine, to withdraw his plea to Count Four of Indictment No. 16167, the 1943 theft case [*id.* p. 5]. The clerk read Count Four of Indictment No. 16167 and then read Count Three thereof which formed the basis for Count Four. This was the only remaining count in this indictment, appellant having been acquitted on Count Three in 1943. Appellant then entered a plea of guilty to Count Four [*id.* p. 6].

Thereafter, Mr. Lavine stated that appellant was ready for sentence and that he had pleaded guilty to similar charges in State Court and had been sentenced there. He asked the Court to impose a sentence concurrent with that in the State Court [*id.* p. 11]. Upon ascertaining that appellant had been sentenced to from 10 years to life in the State Court, Judge Weinberger imposed a sentence

of 5 years in Case No. 16167 to be followed by a sentence of 15 years in Case No. 19263, both sentences to run concurrently with the sentence in the State Court or so much thereof as might remain unserved [*id.* pp. 21, 22; Tr. pp. 98, 105].

On July 10, 1950, appellant filed a Motion to Vacate, Set Aside and Declare Void judgments of conviction and sentences in Case Nos. 16167 and 19263 [Tr. p. 84].

By a memorandum of conclusions on Motion to Vacate Judgment, dated December 21, 1950 [Tr. p. 150], Judge Weinberger discussed the motions at great length. The motions had been filed *in propria persona* but the Court appointed Morris Lavine as counsel. The motion had alleged coercion on the part of an Agent of the Federal Bureau of Investigation as wrongfully inducing the pleas of guilty. The United States Attorney filed depositions of two Federal Bureau of Investigation Agents rebutting this claim [Tr. pp. 113, 121]. On November 17, 1950 [Tr. p. 151], Mr. Lavine asked a continuance in order to take the deposition of one of these Federal Bureau of Investigation Agents. Appellant had furnished Mr. Lavine some 60 questions to be propounded to this Agent, Mr. Furbush.

The deposition was taken and pursuant to stipulation of the parties was filed as testimony given at the hearing on said motion. The Court questioned counsel on whether appellant desired to appear at the hearing [Tr. p. 151] and entered a Minute Order [Tr. p. 151] directing him to obtain a statement in writing as to whether the appellant

wished to be brought into Court for a further hearing on this motion. Appellant replied [Tr. p. 152] that when he filed his motion he did not anticipate the appointment of counsel and that he was not well and did not wish to risk injury to his health by being removed to Los Angeles County Jail during the hearing. Further, by a letter dated December 7, 1950 [Tr. p. 152] he indicated that the records, documents and arguments were all before the Court and that there was nothing more to add. After a careful analysis and summation of appellant's claims Judge Weinberger determined that the appellant was entitled to no relief and denied the motions.

Appellant brought another Motion to Vacate Judgment in Case No. 19263, which was denied by Minute Order dated May 25, 1951.

On October 25, 1951, appellant filed this Petition for Writ of Habeas Corpus [Tr. p. 2] alleging an illegal imprisonment by Dr. Marion R. King, Superintendent of the California Department of Corrections, Medical Facility, Terminal Island, California. He acted *in propria persona.* On October 25, 1951, the Court granted him leave to appear *in forma pauperis.* On October 26, 1951, the Court, Judge Yankwich, appointed Henry P. Lopez as counsel for the petitioner and ordered the clerk to prepare an Order to Show Cause Why a Writ of Habeas Corpus should not issue. On October 29, 1951, the Order to Show Cause was issued [Tr. p. 22] directed to James J. Boyle, United States Marshal for the Southern District of California.

By Minute Order dated November 26, 1951 [Tr. p. 50] Judge Yankwich discharged the Order to Show Cause and denied the Petition for Writ of Habeas Corpus. Findings of Fact and Conclusions of Law [Tr. p. 56] and Order [Tr. p. 58] were signed December 3, 1951. The Court analyzed this case at length in his remarks from the bench on November 26, 1951 [R. T. Nov. 26, 1951, p. 7].

Thereafter appellant wrote Judge Yankwich [Tr. p. 61] and asked to have Mr. Lopez relieved as counsel and asked leave to file an appeal *in forma pauperis*. The Court granted this request [Tr. p. 63] by Minute Order dated December 26, 1951.

On January 30, 1952, appellant filed another Motion to Vacate and Set Aside Sentences in Cases Nos. 16167 and 19263. By Minute Order dated February 15, 1952, the Court ordered that the motion not be set until the appeal had been heard on the habeas corpus [this instant proceeding]. On February 21, 1952, the Minute Order of February 15, 1952, was corrected by a further Minute Order deleting the reference to Case No. 16167 in that Minute Order. The Court entered a further order denying Petitioner's motion to reconsider the Court's Minute Order of February 15, 1952.

Questions Presented.

As the multiple assignments of error set out by the appellant defy any attempt to extract individual questions for reply the assignments of error will be answered hereinbelow as well as possible in their chronological order.

ARGUMENT.

APPELLANT'S ASSIGNMENT OF ERROR NO. 1.

The Court Erred by Ignoring the Respondent Named in the Petition for the Writ: and, Instead Named the United States Marshal: and Erred in Accepting the "Return" From Said United States Marshal.

The appellant is claiming that the Order to Show Cause Why a Writ of Habeas Corpus Should Not Issue should have been directed to Dr. King, the Superintendent of the State of California Department of Corrections, Medical Facility, and not to the United States Marshal.

Under the provisions of Section 2241, Title 28, United States Code, a Writ could have been granted to the appellant only if

> "(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or * * *"

As the appellant makes no claim that the sentence rendered by the State Court was illegal, he must rely on one of the first two sections above. He contends that the state Medical Facility is holding him pursuant to the judg-

ments of the Federal Court. This argument is obviously fallacious as this Court can take notice of the fact that the State of California does not house federal prisoners except through its county and city jails while awaiting trial or upon special contract, not shown here. The appellant had already been sentenced by the State Court before the Federal Court rendered a sentence to run concurrently with the state sentence. The fact that his state sentence had not technically begun to run, due to a delayed commitment order, at the time the federal sentence was rendered, does not alter the fact that the federal sentence is tied to the state sentence to the extent that they shall run concurrently until one or the other runs out, at which time the longer of the two will continue to run until properly terminated.

Any argument that the Medical Facility was a federal institution because the federal government owned the land and buildings which it leased to the state, or that Dr. King became a federal employee or authorized representative of the Attorney General because of the concurrent sentences rendered in the federal court, are equally without merit.

As there was no federal officer to whom the Order to Show Cause could issue as being the custodian of the person of the appellant, and as the state judgments were not challenged, there was no one to whom the Order could issue except the United States Marshal. The Court obviously chose that means of formulating the issues so that the matter would be properly before it.

APPELLANT'S ASSIGNMENT OF ERROR NO. 2.

The Court Erred by Conducting the November 26, 1951 Proceedings on the "Return" to Its "Order to Show Cause" Under the Mistaken Belief It Had Issued the Writ, That the Petitioner Was Present and Also Was Represented by Counsel, and That It Was Holding a Hearing on the Merits of the Points Raised in the Petition.

While the Court misspoke himself, at first, in indicating that he had determined that the Writ should be discharged instead of denying the Writ, it is clear that he gave the appellant the benefit of the full hearing he would have had had the Writ actually been issued prior to the hearing. At no time was the Court *required* to issue the Writ.

An attorney, Mr. Lopez, was appointed by order of the Court dated October 26, 1951 [Tr. p. 26].

The Court was foreclosed from granting a Writ by the terms of Section 2255 of Title 28, United States Code, but still gave the appellant's attorney an opportunity to argue the matter. The fact that the Court leaned over backward to give the appellant every possible opportunity to be heard certainly should not be the basis for complaint at this point.

A Writ not having issued, there was no requirement that the appellant be physically present in Court when he had representation by counsel.

APPELLANT'S ASSIGNMENT OF ERROR NO. 3.

The Court Erred in Holding It Did Not Have Jurisdiction to Issue the Writ, Hear and Grant the Relief Prayed for; That the Petitioner Is Solely in State Custody; That "While Serving Said State Sentence" the Federal Judgments Challenged in the Petition Were Imposed on the Appellant.

The Court rightly held that it did not have jurisdiction to entertain the Writ.

Section 2255, Title 28, United States Code;

United States v. Hayman, 342 U. S. 205;

Fred Dwight Jones v. Squier (Warden), No. 13200, C. A. 9;

Willard A. Winhoven v. Swope (Warden), No. 12933, C. A. 9.

As pointed out under the discussion of Assignment of Error No. 1, the Court correctly determined that appellant was serving a state sentence and that he was in the physical custody of the State of California at the time of his Petition for Writ of Habeas Corpus. These points are more fully discussed under Assignment of Error No. 1.

It is immaterial whether the running of the federal sentences began before the running of the state sentence due to the delay in execution of a state commitment order. The fact is that the appellant was in a state prison under the authority of a state commitment order at the time that he made his Petition for Writ of Habeas Corpus. Those are the guiding jurisdictional facts in determining whether

or not the Writ will lie. The fact that the Court ordered the federal sentences to run concurrently with the state sentences did not make the appellant a federal prisoner as long as a portion of the state sentence remained and the appellant was in a state prison by virtue of prior acquisition of jurisdiction by the state.

APPELLANT'S ASSIGNMENT OF ERROR NO. 4.

The Court Erred in Deciding Against the Merits of the Charges Raised in the Petition, Because Its Factual Consideration of the Charges Was Limited to Material Obtained From the Proceedings: "Motion to Vacate No. 16167-Cr." and Said Proceedings as Held, Were Not a Legal Hearing.

Appellant argues that the pleas of guilty which he entered in the federal court were solely induced by the coercion and influence of an agent of the Federal Bureau of Investigation. The Court, at the hearing on the Motions to Vacate Judgments, had before it the affidavit of the appellant and the affidavits and depositions of the Federal Bureau of Investigation agents. The Court apparently chose to disbelieve this appellant, even under oath. As the record showed that the appellant was represented at all stages of the proceedings by his attorney and that the attorney intimated to the Court that he had discussed the question of a plea of guilty with the United States Attorney, there was every indication that the appellant had the advice of counsel at all times and acted in conformance therewith.

On the hearing of the Order to Show Cause Why Writ of Habeas Corpus Should Not Issue, the Court below merely adopted the findings and record of proceedings from the Motion to Vacate Judgments. As the appellant had no right to a hearing on a Writ of Habeas Corpus, he should hardly complain that the Court went to the trouble to further explain the action previously taken rather than to enter a denial of the Writ summarily.

The appellant now seeks through habeas corpus proceedings to review the Order Denying the Motion to Vacate Judgments. That has been clearly established by Section 2255 of Title 28, United States Code and by *United States v. Hayman,* 342 U. S. 205, as being by appeal from the Order and not by Writ of Habeas Corpus. No appeal was taken by this appellant and he cannot now be heard to complain of that proceeding.

It should be noted that the quotations given by the appellant on page 31 of his Opening Brief are not quotations at all. They are paraphrases of the record and are frequently inaccurate. The record itself tells an entirely different story.

The appellant again raises the question of arraignment. This has been discussed at length under Assignment of Error No. 5.

This Assignment of Error appears to be something of a catch-all for all the appellant's complaints. It is believed that all of the claims contained therein have been covered elsewhere in this brief.

APPELLANT'S ASSIGNMENT OF ERROR NO. 5.

The Court Erred in Not Discharging the Petitioner as to Judgment No. 19263-Cr., on "Point No. 2" as Set Out in the Petition for the Writ: When This Vital Charge Was Not Traversed by the Respondent, Was Not Controverted at the Hearing, and Was Not Found Against by the District Court.

In the first place, as hereinbefore stated, the Court had no authority to grant a Writ due to the limitations of Section 2255 of Title 28, United States Code and the decisions thereon in the United States Supreme Court and in this Court of Appeals.

Secondly, as there was no Writ, no Return or Traverse was called for. The government merely filed an Answer to Order to Show Cause with a supporting memorandum of authorities. The government did not thereby admit the truth of the appellant's allegations.

Thirdly, the allegations of the appellant are not true. As set forth in the statement of facts, there was in fact an arraignment. The Reporter's Transcript of the Proceedings of June 6, 1947, shows that appellant's counsel asked that the previously entered plea of not guilty be withdrawn [p. 3], the Court asked if there had been an arraignment and the Assistant United States Attorney replied in the affirmative [p. 4], and despite attempts by counsel for appellant and appellant himself to waive the reading of the indictment [p. 4], the indictment was read to him before the plea was accepted [p. 5].

There was in fact an arraignment. However, even had there been no formal arraignment, there would have been no fatal error. To be error, there must be a violation of a substantial right. A mere failure to meet all the formal

requirements of arraignment is not enough. (*Garland v. State of Washington,* 232 U. S. 642, 34 S. Ct. 456, 58 L. Ed. 772.) This rule has not been materially changed by the adoption of the Federal Rules of Criminal Procedure Rule 10. (*Merritt v. Hunter,* 170 F. 2d 739; *Mayes v. United States,* 177 F. 2d 505.)

APPELLANT'S ASSIGNMENT OF ERROR No. 6.

The Court Erred in Not Issuing the Writ When the Petition Was Good on Its Face Presented Sufficient Sworn to Facts and Authorities Which if Supported at a Hearing Would Have Justified Granting the Relief Prayed for.

As stated hereinbefore, the Court below was not only not bound to issue the Writ but was actually prevented from doing so by the terms of Section 2255 of Title 28, United States Code and the interpreting decisions previously cited. Motions to Vacate the Judgments had previously been denied.

The sworn statements of the appellant were obviously not "good on their face" when they directly controverted the reporter's transcript of the proceedings. Despite his denials, the record shows that the appellant was represented by counsel at all times.

The authorities cited by the appellant are not authority for the proposition that a Writ of Habeas Corpus will lie after Motions to Vacate Judgment have been denied, especially since Section 2255 of Title 28 has been enacted.

Conclusions.

Due to the multitudinous claims by the appellant, the appellee has attempted to answer as many of the contentions as possible. Actually, however, this case falls squarely within the provisions of Section 2255 of Title 28, United States Code, the *Hayman* case, and the *Fred Dwight Jones* and *Willard A. Winhoven* cases (decided by this Court and heretofore cited). As such, no Writ of Habeas Corpus could have issued to this appellant and all of his complaints as to the conduct of the hearing on the Order to Show Cause are irrelevant.

A reading of the transcripts of proceedings before both Judge Weinberger and Judge Yankwich reveals quite clearly that they acted with an abundance of caution in dealing with this appellant. They were evidently aware that they were dealing with a smart criminal who would seek to introduce error into the record. Both judges gave the appellant every safeguard, appointed counsel for him at each stage of the proceedings, rendered written opinions, and one made Findings of Fact and Conclusions of Law. They went to far more trouble than would ordinarily be customary in a case such as this. This brief and the pleadings in the Transcript of Record show that the appellant has acquired considerable knowledge of legal proceedings in his numerous sojourns in penal institutions and that he is not above distortion of the truth if it will serve his purposes.

It is respectfully submitted that the Order Denying Petition for Writ of Habeas Corpus, appealed from herein, should be affirmed.

Respectfully submitted,

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